IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR and
S. J. UNGAR REALTY AFFILIATES, INC.,
*Petitioners,*

v.

HON. JAMES J. LEFF,
Justice of the Supreme Court,
New York County,
*Respondent.*

SIDNEY J. UNGAR,
*Petitioner,*

v.

NAHIM ISAIAS and
WATER FRONT SERVICE STATIONS, INC.,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX.**

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NAHIM ISAIAS and
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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND APPENDIX.

Petitioner[1] prays that a writ of certiorari issue to review two judgments of the Appellate Division, First Department,

[1] For simplification of presentation "petitioner" shall be used to refer to either of the two petitioners or both. The individual petitioner is the president and sole stockholder of the corporate petitioner.

of the Supreme Court of the State of New York, in separate but related cases. In one case the Appellate Division by order dated September 21, 1971, dismissed a petition for an order of prohibition directed to a Justice of the Supreme Court, New York County. In the other, the Appellate Division by order dated January 25, 1972, dismissed an appeal from an order denying a motion to vacate a permanent injunction.

## OPINIONS BELOW

The Appellate Division wrote no opinions.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division in the prohibition proceeding was entered on September 21, 1971. On October 20, 1971, the Court of Appeals of the State of New York dismissed petitioner's appeal taken as of right and on January 5, 1972, denied petitioner's motion for leave to appeal. The order of the Appellate Division in the injunction action was entered on January 25, 1972.

## QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment is violated by

1. the adjudication of important property rights of a party toward whom the judge has manifested bias and hostility;

2. the determination, without a hearing and without permitting the introduction of evidence, that the parties had not entered into a contract of settlement with respect to pending litigation;

3. the rendition of a punitive judgment, inconsistent with his findings, because of a party's refusal to accede to a judge's proposal for compromising the amount in dispute in a foreclosure action.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *.

## STATEMENT OF THE CASE

The present litigation arises out of proceedings initiated by respondent Isaias in 1968 to foreclose a junior mortgage on three contiguous parcels of real property in New York City in which petitioner has the principal interest as senior mortgagee and owner of the fee. As senior mortgagees in possession petitioner and others were managing the real property. In April of 1970 they entered into a lease of the property for operation as a parking lot following demolition of three buildings on the property and commenced demolition in November of 1970. Thereupon respondent Isaias commenced an independent action against petitioner and others to restrain the demolition and a permanent injunction was granted on February 19, 1971. Meanwhile, respondent Isaias obtained the appointment of a receiver in his foreclosure action which had the effect of ousting the senior mortgagees from possession.

The Isaias foreclosure action came on for a trial before Justice Fine who directed judgment for the junior mortgagee and referred the case to a referee for a determination of the amount owing. Before the issues raised in the respective foreclosure actions were finally resolved, settlement negotiations were conducted with the aid of Justice Fine which petitioner and Justice Fine understood resulted in a stipulation of settlement on April 28, 1971, under which all controversy would be terminated, the injunction and receivership would be vacated, and petitioner would pay respondent Isaias $240,000.00 in exchange for an assignment of his mortgage. Subsequently, after the attorneys for respondent Isaias refused to effectuate the settlement, claiming no agreement had been reached, Justice Fine on May 6, 1971, after hearing, ruled that the

case had been settled by stipulation of the parties before him on April 28, 1971, and on May 24, 1971, entered an order confirming the settlement and directing respondent Isaias and his attorneys to comply with its terms.

On appeal, on July 1, 1971, the Appellate Division reversed the order of Justice Fine, holding that the record was insufficient to permit it to determine whether a settlement had been reached and stating:

> "The court decided on what he himself heard and saw. We are not shown what these facts were, only the judge's conclusions from them. The order must therefore be reversed, but without prejudice to such further application as either party may be advised to make. It would further appear that in any such application the judge's testimony as to what took place could be very material and that the matter should be heard by another court. Even if no application based on the claimed settlement should be made and the matter proceeded in its regular course, it would be inadvisable to have it concluded by the same judge."

Thereafter, on July 12, 1971, Justice Fine referred to Justice Leff the foreclosure action and related matters. At that time there were pending, among other matters, motions to vacate the injunction and to terminate the receivership for the reasons, among others, that (1) tremendous losses were being sustained as a result of the continuation of the receivership and injunction because the buildings involved were vacant and unrentable, revenues of $3,500 to $5,000 a month from the parking lot lease were being lost, and the costs of demolition were rising, (2) the injunction and receivership were being employed as a "holdup" tactic against petitioner, and (3) they did not serve to protect the interest of the junior mortgagee because the value of the property would be enhanced by demolition of the buildings and the payment in full of the junior mortgagee was secured by both the value of the security after demolition and a proffered bond for any judgment that might be obtained. The motion to

vacate the injunction offered to post a bond in the amount of $240,000.00, or such other sum as the Court might fix, to secure the interests of the junior mortgagee.

After the matter had been referred to Justice Leff, there were informal communications with his office to establish procedures for determining the question of whether the parties had agreed to a settlement before Justice Fine. On July 27, 1971, Justice Leff's secretary made four telephone calls to petitioner. In the first conversation, petitioner was advised that Justice Leff proposed that he pay to Isaias forthwith the sum of $220,000.00 and indicate the amount petitioner claimed would still be due on the mortgage, that the court would then fix the amount of a bond to be filed as security for such additional amount. The injunction and receivership would then be vacated and a hearing would be conducted in September to determine the additional amount due. Petitioner rejected this proposal as identical with one previously made by Isaias' attorney and advised that he was prepared to proceed to trial on the issue of settlement.

In the second conversation, petitioner was advised that Justice Leff had read all the papers in the case and had determined that there was no settlement, that the court would enter an order on the following day so holding and setting the case down for a hearing as to the amount due. In the third conversation, petitioner was advised that if he desired a hearing on the issue of settlement, it would be held late in September but meanwhile the losses resulting from the receivership and injunction would continue. Petitioner then advised that he was prepared to post a bond in the full amount that Isaias could possibly recover. In the fourth conversation, petitioner was advised that the Justice had rejected his counter proposal and suggested that petitioner reconsider his earlier proposal which petitioner declined to do. Petitioner then requested oral argument on the pending motions, which did not involve the issue of settlement and was advised that it would not be granted.

A reply affidavit relating to the motion to vacate the receivership and injunction, filed July 27, 1971, set forth, among other things, that the continuation of the receivership and the injunction deprived petitioner of the rental provided for in the parking lot lease, that petitioner suffered damages of $50,000.00 as a result of Isaias' refusal to effectuate the claimed settlement agreement and that petitioner was prepared to post a bond in any amount fixed by the court. He requested the court to prescribe the procedure for determination of the settlement issue and proof of damages for failure to consummate the settlement.

On July 28, 1971, Justice Leff, in a conversation with the attorney for one of the interests affiliated with petitioner, made the following statements:

> "Ungar always misrepresents and does not tell the truth. Ungar is a son of a bitch and has gone as far as he will go in this matter. Ungar is trying to get cheap money and he is delaying the matter deliberately. I do not believe Ungar is suffering any damage. I will not see Mr. Ungar and he cannot be in my presence. The only way Ungar can get possession and vacate the receivership is to pay $220,000 and put up a bond for the balance. I have read the Appellate Division decision and it does not say that there must be a hearing before a determination can be made as to whether there was any settlement. I am going to deny the motions at the end of the week and instruct the plaintiff to go ahead with the foreclosure proceedings."

On the same day Justice Leff signed an order which denied the pending motions and on the following day, July 29, 1971, signed a memorandum opinion, filed July 30, 1971, in which he held, notwithstanding the fact that the issue had not been presented for determination and that he had held no hearing and received no evidence, that there had been no valid settlement terminating the actions. The memorandum opinion further stated that

he had "articulated what I deem to be the posture of the case as it is now before me. I am doing this by way of a written decision because the insidious character of the representations made by Sidney J. Ungar, a disbarred lawyer appearing pro se,[2] are such that I do not deem it prudent to communicate informally or by conference with the parties litigant."

The memorandum opinion continued:

> "Briefly, the only issue in what should be a simple mortgage foreclosure, is how much is owed Nahim Isaias on a past-due second mortgage. The interests associated with Sidney J. Ungar are the owners of the senior mortgages and of the underlying fee. It appears unquestioned, at this time that: (1) the action need not go to a foreclosure sale; (2) that the value of the property is such that Nahim Isaias can, in all likelihood be paid in full; (3) that a receivership should not be necessary to assure the ultimate payment of Isaias' claim; and (4) that the injunction against demolition could be vacated without prejudice to the payment of Isaias' claim. None of this is now possible by reasonable and expeditious means because of the posture of Ungar."

The memorandum opinion further held that "the receiver is to continue in possession and the injunction to remain in force."

On August 12, 1971, petitioner filed in the Appellate Division a petition for an order of prohibition, among other things, enjoining Justice Leff from conducting any further proceedings in the foreclosure action and in all other related pending matters on the ground that his

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[2] In 1968 petitioner had been ordered to show cause by the United States District Court for the Southern District of New York why he should not be removed from its rolls as an attorney on the same charges that resulted in his disbarment by the Appellate Division. He answered each charge by a lengthy affidavit. No further proceedings were taken in the federal court and he remains a member in good standing of the bar of that court.

bias and prejudice to petitioner will prevent him from rendering an impartial judgment therein and directing that all pending matters be conducted by another Justice. The petition alleged among other things that Justice Leff's findings demonstrated "that he was so biased and prejudiced against Ungar that he was incapable of judging the case with the impartiality that the law requires of a Justice of the Supreme Court" and that the justice's findings with respect to the necessity of continuing the receivership and the injunction and his continuation of the receivership and injunction notwithstanding these findings demonstrated that his "direction constituted a retributive reprisal against Ungar for having rejected the proposal of Justice Leff."

In an amendment to the petition filed on August 18, 1971, petitioner alleged that the decision of Justice Leff, dated July 29, 1971, and his judicial conduct described in the petition "denied to the petitioners their constitutional right to an adjudication in conformity with due process of law, and their constitutional right to equal protection of the laws, as guaranteed to them in the Constitution of the United States and in the Constitution of this State."

On September 21, 1971, the Appellate Division dismissed the petition for an order of prohibition. On September 23, 1971, petitioner filed a notice of appeal as of right in the Court of Appeals. On October 20, 1971, the Court of Appeals dismissed the appeal upon the ground that it does not lie as of right. On November 15, 1971, petitioner filed a motion for leave to appeal to the Court of Appeals which the Court of Appeals denied on January 5, 1972.

In his affidavit in support of the motion for leave to appeal, petitioner also recited that the supplement to his petition for an order of prohibition which was denied by the Appellate Division had "raised the issue that the judicial conduct of Justice Leff had denied petitioners their

constitutional right to an adjudication in conformity with due process of law and also their constitutional right to equal protection of the laws." His supporting brief stated that "The moving affidavit contends that the conduct of Justice Leff produced a miscarriage of justice and a denial of the petitioner's constitutional rights to a fair trial in conformity with due process and equal protection of the law."

The specific acts of judicial misconduct alleged to constitute a denial of the constitutional right to a fair trial in conformity with due process were (1) the determination of the controlling issue of whether there had been an agreed settlement without affording petitioner the right to a hearing, (2) the continuation of the injunction and receivership, despite a finding that there was no need for such restraints, as an act of retributive vengence because petitioner refused to abandon the original settlement and to accept Justice Leff's proposal to pay $220,000 forthwith and have the court then determine the amount still due on the mortgage, and (3) Justice Leff's manifest bias and prejudice which rendered him incapable of making an impartial judicial determination of the issues.

In the appeal to the Appellate Division from Justice Leff's order of July 28, 1971, which denied the motion dated July 9, 1971, to vacate the injunction, petitioner's brief requested the court to consider "whether or not the actions and conduct of Justice Leff were such as to deprive the appellants of due process of law and equal protection of law as guaranteed by the State and Federal Constitutions, based on his clearly stated prejudice and hostility to the appellant herein" and petitioner's constitutional "rights to a hearing on the issues of whether a settlement had been agreed on by the parties in the foreclosure action." On January 25, 1972, the Appellate Division dismissed the appeal relating to Justice Leff's order denying vacation of the judgment of injunction.

## REASONS FOR GRANTING THE WRIT

The decisions of the court below (1) in refusing in the prohibition proceeding to disqualify the trial judge who by his own statements and his conduct manifested a strong bias and hostility toward petitioner and (2) in dismissing in the injunction proceeding the appeal from an order based upon the determination without a hearing or opportunity to present evidence on the controlling issue whether a settlement had been agreed upon, deprived petitioner of a fair trial and constituted a denial of the basic standards of due process of the Fourteenth Amendment contrary to decisions of this Court.

1. Before deciding the several motions pending before him, Justice Leff stated to an attorney in the litigation, although petitioner had not appeared before the judge or made any representations to him, that "Ungar always misrepresents and does not tell the truth. Ungar is a son of a bitch and has gone as far as he will go in this matter." In a memorandum opinion signed the following day explaining his disposition of the pending motions, he referred to "the insidious character of the representations made by Sidney J. Ungar, a disbarred lawyer appearing pro se." The opinion continued "(3) that a receivership should not be necessary to assure the ultimate payment of Isaias' claims; and (4) that the injunction against demolition could be vacated without prejudice to the payment of Isaias' claim" but held, nevertheless, that "the receiver is to continue in possession and the injunction to remain in force." The expenses of the receivership exceeded its income and the injunction deprived petitioner of substantial parking lot revenue, thus resulting in significant losses to petitioner. Their continuation, notwithstanding the judge's finding that they were not necessary to secure the payment in full of the junior mortgage and petitioner's offer to post a bond in any amount fixed by the court to secure such payment in full, can only be viewed as a punitive act flowing from manifest hostility to petitioner.

The adjudication of issues in litigation by a judge who has manifested such bias and hostility offends "the due process requirement of an impartial tribunal." *In re Murchison*, 349 U.S. 133, 134 (1955). "A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra*, at 136. Whether the bias results from interest or hostility, disqualification is required. In *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court held disqualification to be warranted because "no matter what the evidence was against him, he had the right to have an impartial judge." And in *Offutt v. United States*, 348 U.S. 11 (1954), this Court held that indications of hostility by the trial judge demonstrated a bias and lack of impartiality which required that the matter be tried before another judge. Similarly, in *Cooke v. United States*, 267 U.S. 517, 539 (1925), the Court held that the matter should be heard before another judge because "the case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion."

Judge Leff's lurid and unflattering characterization of petitioner and his vindictive infliction of substantial monetary losses by a determination to continue an injunction which the judge himself acknowledged to be unnecessary clearly demonstrate the bias and lack of impartiality which required the judge's disqualification to comport with the Fourteenth Amendment's due process requirements. The Appellate Division's failure to enjoin Justice Leff's participation in the litigation by dismissal of the petition for an order of prohibition denied petitioner due process.

2. The determination, without hearing, without argument, and without permitting any evidence to be offered, that there had been no settlement agreement also constituted a denial of due process. The issue of settlement

was pivotal to the entire litigation. Justice Fine had ruled that there had been a settlement agreement and that its consummation would dispose of all issues in the litigation including, obviously, the receivership and injunction. In holding that the record of proceedings before Judge Fine was insufficient to permit it to determine whether a settlement had been reached, the Appellate Division stated "the order must therefore be reversed, but without prejudice to such further application as either party may be advised to make. It would further appear that in any such application the judge's testimony as to what took place could be very material and that the matter should be heard by another court."

It is clear from the Appellate Division's opinion that there was to be a redetermination of the question of settlement on which "the judge's testimony as to what took place could be very material." Judge Leff, however, refused requests to establish a procedure for determining the settlement issue and, without a hearing and without receiving "the judge's testimony as to what took place" or any other testimony, decided on the record which the Appellate Division had held insufficient for such determination that there had been no settlement.

The Appellate Division acknowledged, in reversing Justice Fine's order, that the settlement "would terminate the action and no further proceedings could be had in it." Justice Leff, therefore, could not "consistently with due process" decide that pivotal question without a hearing. *Bell v Burson*, 402 U.S. 535, 541 (1971). The pronouncements of this Court that a prior hearing is an indispensable prerequisite to a decision affecting important property rights are legion. In *Sniaduch v. Family Finance Corp.*, 395 U.S. 337, 342 (1969), the Court announced that "it needs no extended argument to conclude that absent notice and a prior hearing * * * this prejudgment garnishment procedure violates the fundamentals of due process." "In every setting where important decisions turn on questions

of fact, due process requires an opportunity to confront and cross examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Accordingly, the Court went on, denial to a recipient of public assistance of the right to present evidence or to confront or cross-examine adverse witnesses before the termination of public assistance payments was "fatal to the constitutional adequacy of the procedures." 397 U.S. at 268. An adjudication of property rights "must be preceded by notice and opportunity for a hearing" which "must measure up to the standard of due process." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). This right to a fair hearing has been characterized as "one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *R.R. Comm'n v. Pacific Gas Co.*, 302 U.S. 388, 393 (1938).

Since a judgment entered without a hearing is void for want of due process of law (*Hovey v. Elliott*, 167 U.S. 409 (1897)), Justice Leff's determination without hearing that there had been no settlement agreement is invalid with the result that his direction that the injunction against demolition continue, which depended on this finding, is similarly invalid. The Appellate Division's dismissal of the appeal from this decision was, therefore, a denial of due process.

## CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
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Washington, D.C. 20006
*Attorney for Petitioner*

## APPENDIX A

## ORDER OF COURT OF APPEALS, January 5, 1972

Mo. No. 981

IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR and S. J. UNGAR
REALTY AFFILIATES, INC.,
*Appellants,*

For an Order &c. directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
*Respondent.*

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

/s/ Gearon Kimball
Deputy Clerk

[SEAL]
A copy

# ORDER OF COURT OF APPEALS
October 20, 1971

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Mo. No. 860B

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IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR & ANO.,
*Appellants,*

For an Order &c. directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
*Respondent.*

---

A cross-motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said cross-motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground it does not lie as of right.

/s/ Gearon Kimball
Deputy Clerk

[SEAL]
A copy

# ORDER OF APPELLATE DIVISION
**September 21, 1971**

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**3990**
**[M-7426]**

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IN THE MATTER OF THE
APPLICATION OF SIDNEY
J. UNGAR and S. J. UNGAR
REALTY AFFILIATES, INC.,
*Petitioners,*

For an Order Pursuant to Article 78 C.P.L.R.
Directed to

HON. JAMES J. LEFF, JUSTICE
OF THE SUPREME COURT,
NEW YORK COUNTY,
*Respondent.*

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The above-named petitioners having presented a petition, verified August 12, 1971, to this Court, praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and Rules, (1) vacating a direction of respondent ordering a reference before an official referee to determine the amount due in a foreclosure action and staying any action by said referee therein; (2) directing respondent to conduct hearings pursuant to an order of this Court to determine whether a settlement had been entered into between the parties; (3) enjoining respondent from conducting any further proceedings on the grounds of bias and prejudice; and (4) directing that any additional proceedings be had before another justice;

Now, upon reading and filing the notice of application, dated August 12, 1971, with proof of due service thereof, the petition of the above-named petitioners, verified August

12, 1971, and the exhibits annexed thereto, the affidavit of Sidney J. Ungar and the memorandum of Irving L. Weinberger, all read in support of the petition, and the memorandum of Hon. Louis J. Lefkowitz, Attorney General, in opposition thereto, and after hearing Mr. Irving L. Weinberger for the petition, and Hon. Louis J. Lefkowitz opposed, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs and without disbursements.

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## ORDER OF APPELLATE DIVISION
### January 25, 1972

4705-08N—Appeal from order, Supreme Court, New York County (Fine, J.), entered July 13, 1971, and orders, Supreme Court, New York County (Leff, J.), entered July 20, 1971, (a) denying cross-motion to vacate receivership and (b) denying vacation of receivership and judgment of injunction, unanimously dismissed as non-appealable, moot and academic, without costs and without disbursements. Order, Supreme Court, New York County (Leff, J.), entered July 30, 1971, denying motion to direct receiver to maintain status quo, unanimously affirmed. Respondent Isaias shall recover of appellants $30 costs and disbursements of this appeal. These protracted proceedings would best be terminated and the interest of the parties better served by the forthwith completion of the matter at Trial Term rather than by continued appeals.

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NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,
*Respondents.*

## BRIEF OF RESPONDENT NAHIM ISAIAS AND APPENDIX

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NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,
*Respondents.*

## BRIEF OF RESPONDENT NAHIM ISAIAS

### Statement

It is to be noted that there are in fact two applications for Writs of Certiorari albeit combined under one cover.

Respondent Isaias shall treat each separately. Under the sub-section "Jurisdictional Objection" *infra,* said re-

spondent makes adequate showing of his litigable interest and thus his right to be heard.

## Jurisdictional Objection

### (A)

Respondent Nahim Isaias, albeit not named in first entitled above application, is nonetheless a vital and interested party. In substance it is his rights that are sought to be affected.

New York State CPLR, Sec. 7802 (c) provides:

> "where the proceeding is brought to restrain a • • • officer from proceeding without or in excess of jurisdiction in favor of another, *the latter shall be joined as a party.*" (emphasis supplied)

In the New York State Appellate Division whereat petitioners instituted their prohibition proceeding against Justice Leff, respondent Nahim Isaias intervened and filed opposing papers. That proceeding was denied and the petition dismissed by the order of September 21, 1971. Attempted appeal to the New York State Court of Appeals, as of right was dismissed (29 N.Y. 2d 724). Petitioners' application for leave to appeal was denied by order of that court, dated January 5, 1972 (A-1a).

Respondent was heard in both the New York State Appellate Division and the New York State Court of Appeals, as of right, pursuant to the above quoted statute, so at bar, he likewise should be heard.

T. 28, Sec. 2101 (c), USCA, provides that any Writ of Certiorari shall be applied for within ninety days after entry of such judgment.

The judgment of denial and dismissal of the New York State prohibition proceedings was had on September 21,

1971. Thus it is patent that the instant writ application is untimely and should be denied and the writ dismissed. (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399; *Rust Land etc. Co.* v. *Jackson*, 250 U.S. 71; *Whitsitt* v. *Union Depot Co.*, 122 U.S. 363; *Glasgow Nav. Co.* v. *Munson Steamship Line*, 246 U.S. 647; *Collard* v. *Pittsburgh etc. R. Co.*, 246 U.S. 653.)

Where a state court, as at bar (aside from the untimeliness) denies prohibtion, the only question this court could entertain, if any at all, would be whether the state court erred in deciding a federal question respecting the validity of a statute on which the trial court's jurisdiction was based (*Bandini Petroleum Co.* v. *Superior Court of State of California*, 284 U.S. 8).

Patently, in a foreclosure action, jurisdiction of the New York State Courts depends, not on any federal statute, but only on a New York State statute (*Art. 13, Sec. 1301, et seq., New York State Real Property Actions and Proceedings Law*).

Thus absent any federal question this application for a writ is baseless.

**(B)**

In the second above entitled application, respondent Nahim Isaias asserts lack of jurisdiction to entertain or grant the instant writ.

Petitioner seeks to apply this writ application to an interim and interlocutory order of the New York State Appellate Division, entered on January 25, 1972.

As shown by petitioners' appendix (4a), that court dismissed two of the three appeals as being non-appealable; in addition to being moot and academic.

The order of July 30, 1971, whereby the New York State Court denied petitioners' motion to have the rent receiver

(appointed pursuant to terms of respondent's mortgage) maintain *status quo*, was unanimously affirmed. That order, as affirmed involves the "housekeeping" and regulatory procedure by a court appointed officer (receiver) concerning property in *custodia legis*. It is hardly a constitutional question under the 14th Amendment. It certainly does not embrace any substantial federal question. It is likewise not within the Congressional intent expressed in T. 28 Sec. 1257 (3), USCA.

Petitioners here are in reality seeking revisory power over the New York State Courts' practice and regulation of its procedure. Such revisory power vests no authority or jurisdiction in this court, as it is patent, that such procedure and practice is not any evasion of constitutional guarantees (*Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287; rehearing den. 312 U.S. 715).

This New York State Appellate Division order of January 25, 1972 is but one of the numerous interim-interlocutory procedural orders prior to respondents' final judgment of foreclosure and sale. Finally, the final judgment of foreclosure and sale, is scheduled for argument on May 11, 1972, before the New York State Appellate Division.

## Motion to Dismiss

Respondent Nahim Isaias, both as an interested party in the first enumerated above application (as hereinbefore more particularly specified in Subd. A & B of Jurisdictional objection, *supra*), as well as a named respondent in the second enumerated above application, moves to dismiss instant Writ of Certiorari application as: a) untimely; b) involving no federal question; c) not within the jurisdiction, under T. 28, Sec. 1257 (3) USCA.

In this latter aspect, it should be noted that T. 28 Sec. 1257 (3) USCA invokes the condition precedent that only "Final Judgments" rendered by the highest court of a state in which a decision could be had, may be reviewed.

Thus, as to the New York State Prohibition against Justice Leff, we have herein before shown that that application is untimely.

Furthermore, denial was a matter of discretion and thus no law question, either state or federal can or would be involved. In the absence of any opinion, prohibition was denied as a matter of discretion (New York State CPLR 7801 (1)). It is, of course, clear that petitioners' assertion here, concerning any non-final matter can be adequately reviewed upon appeal from the final judgment of foreclosure sale, now before the New York State Appellate Division, for review.

Finally, Rule 21 o this court requires that "the entire record in the court to which certiorari is addressed shall be filed * * *". There has been no agreement by respondent Nahim Isaias, as to non-compliance with said; nor has this court dispensed with compliance.

Examination of the instant writ application readily reveals that *no such entire record*, is being filed; nor has respondent Isaias been served with any such record. All that is submitted is an alleged appendix, which consists of court determinations; the supporting records upon which same are grounded are omitted.

Failure to comply with Rule 21 of this court is therefore fatal to this writ. It should be dismissed.

The New York State Appellate Division order of January 25, 1972 (pet. app. 4a), is *not* a final judgment nor decree; and therefore not within T. 28, Sec. 1257 USCA.

## Statement of the Case

Nahim Isaias, owner and holder of a valid real estate mortgage covering land and buildings in New York City, instituted in time honored form and substance, a foreclosure action. A purported settlement thereof, together with related actions, instituted by petitioner except respondent's injunction action (hereinafter described) were allegedly settled. That alleged settlement was the subject of an appeal by respondent. The New York State Appellate Division reversed and its opinion is reported at 37 A.D. 2d 702. Petitioner then elected to pursue a course of conduct which attacked the merits of respondent's foreclosure action. Thus he abandoned the alleged settlement, waived it, and irrevocably elected different remedies. Petitioner did *not* pursue the alleged settlement in any form.

Petitioner's attack on the merits was denied at the trial level and upon appeal, upheld. Said appellate determination is reported at —— A.D.2d —— 326 N.Y.S.2d 291, and in which that court stated that petitioners' "charted" their course.

New York State Supreme Court Justice Leff, by his order of October 29, 1971, once again denied petitioner's motions for enforcement of the alleged settlement; disqualification of himself and the Special New York State Supreme Court Referee McNabb, appointed to hear and report the amount due respondent. Petitioners appealed from that order. The New York State Appellate Division, 1st Judicial Department unanimously affirmed that order, without opinion by its order dated March 27, 1972. Directly involved was once again the often repeated and denied alleged settlement. Such affirmance in favor of respondent lays at rest, that which petitioners now complain about.

In addition to petitioners' prohibition proceeding against Justice Leff, they also sought mandamus. The New York

State Appellate Division likewise denied the relief and dismissed the petition; which is reported at —— A.D. (2d) ——, 326 N.Y.S.2d 292. No further appeal was sought therefrom.

Finally with respect to the second enumerated application above, which concerns itself with the injunction judgment obtained by respondent Isaias, it is now beyond any further judicial review.

During the course of the foreclosure, petitioners attempted to demolish, without permission, the buildings constituting part of the mortgage security.

Respondent Isaias instituted suit in the New York State Supreme Court, to restrain petitioners. A temporary restraining was issued. Thereafter a trial was held and a permanent injunction issued by New York State Supreme Court Justice Loreto, restraining the demolition. Petitioners appealed from both the order and judgment to the New York State Appellate Division.

Respondent moved to dismiss said appeals for failure to perfect same. Both appeals were conditionally dismissed unless perfected for the January 1972 term. They have not been. The said New York State Appellate Division by its two orders dated April 11th, 1972, has finalized the conditional dismissals.

Furthermore, petitioners abandoned their appeal from the final judgment of injunction by stating in their brief, to the New York State Appellate Division, in connection with another and later appeal, concerning vacation of certain orders of Justice Leff dated July 28, 1971,

> ". . . from the order of denial by reason of the pendency of the appeal from the original injunction. • • • Said appeal has already been conditionally dismissed and the appellants (petitioner here) have elected not to perfect same." (p. 8 appellant's reply brief)

That reply brief was submitted to the New York State Appellate Division in the appeal entitled,

NAHIM ISAIAS,

Plaintiff-Respondent,

*against*

SIDNEY J. UNGAR,

Defendant-Appellant,

*and*

WATER FRONT SERVICE STATIONS, INC.

Defendant.

Of course, the second above entitled application for a writ is precisely directed in that action, to the order of the New York State Appellate Division order of January 25, 1972 (Appendix p. 4a) refusing vacation of the final judgment of injunction. As heretofore shown said appeal from such final judgment of injunction was finally dismissed by the New York State Appellate Division, by its order of April 11, 1972.

As shown in respondent's attached appendix, petitioners have instituted an action in the District Court of the United States, Southern District of New York, seeking: a) to enforce the alleged settlement; and, b) for a restraining order against the prosecution of the New York State foreclosure action. United States District Judge Weinfeld by his opinion dated January 25, 1972, denied the restraint. Petitioners then purported to amend their complaint and brought on another motion for a stay before United States District Judge McMahon, which is before United States District Judge McMahon, who not only denied petitioners stay, but dismissed the action. (respdts app. p. 21).

Without at further length describing the multiple applications for stays, interim appeals and actions, suffice it to state that there is now on appeal, awaiting determination, respondent's final judgment of foreclosure and sale.

## Reasons for Denying the Writs

No valid reason, in either law or fact has been shown by petitioners for the granting of the writs.

Contraiwise, respondent Isaias, has beyond peradventure of doubt shown herein, that no substantial federal question is present. The applications are untimely and without the jurisdiction vested in this court by T. 28 Sec. 1257, USCA.

Much has been set forth in the instant petition, which is irrelevant and *de hors* the record. The glaring omissions of the litigiousity of petitioners becomes apparent from the brief outline above.

It cannot for a moment be assumed that Judge Leff, whose orders and actions have been reviewed by the Appellate Courts and found not wanting either in merit, law or fact, nor any bias, hostility or prejudice, vests in these disappointed litigants the privilege of these writs.

Respondent Isaias does not quarrel with the pronouncements of this court and all other courts, that if bias, prejudice or hostility, *in fact exists,* that disqualification follows.

Respondent Isaias, however, submits that petitioners' unfounded charges and assertions have been reviewed and found non-existent.

There is no substance to petitioners' argument that a settlement was effected. After the reversal (37 A.D. 2d 702) petitioners voluntarily elected such actions and remedies as were mutually exclusive to settlement.

It was such conduct and actions that prompted the New York State Appellate Division to observe that petitioners had,

> "* * * no basis for impeding the progress of the foreclosure action, particularly in *view of the course of action charted by appellant* (petitioners here) subsequent to our previous decision reported at 37 A.D. 2d. 702, * * *" (emphasis and insert supplied) (326 N.Y.S. 2d 291, not yet officially reported).

Such petitioners' actions were waiver, abandonment, estoppel and election of remedies. All such legal propositions were before the New York State Appellate Division when it arrived at the foregoing determination.

Lest there be some misapprehension, not one application, motion hearing, nor appeal went uncontested by petitioners. Thus their argument that a judgment entered without notice or hearings is a fantasy made of whole cloth. It is sophistry in its ultimate.

## CONCLUSION

**By reason of the foregoing the petition for Writs of Certiorari should be denied and the petitions dismissed.**

Respectfully submitted,

EMANUEL THEBNER
369 Lexington Avenue
New York, New York 10017

*Counsel to Respondent*
*Nahim Isaias*

## Appendix of Respondent Nahim Isias.

ORDER OF THE APPELLATE DIVISION DATED NOVEMBER 4, 1971.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 4, 1971.

Present—Hon. Owen McGivern,
Justice Presiding,
Arthur Markewich,
Francis T. Murphy, Jr.,
Aron Steuer,
George Tilzer,
Justices.

4346
[M-7733]

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In the Matter of the Application of Sidney J. Ungar and S. J. Ungar Realty Affiliates, Inc.,

Petitioners,

For an Order Pursuant to Article 78 CPLR

—directed to—

Hon. James J. Leff, Justice of the Supreme Court, New York County,

Respondent.

---

The above-named petitioners having presented to this Court a petition praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and

*Order of the Appellate Division, dated November 4, 1971.*

Rules in the nature of mandamus directing respondent to sign a certain proposed order, and directing respondent and Special Referee Frank McNabb to immediately discontinue any further actions or proceedings in the foreclosure action or any related action,

Now, upon reading and filing the notice of application, dated October 4, 1971, with proof of due service thereof, the petition of petitioners, verified October 4, 1971, and the exhibits annexed thereto, and the affidavits of Sidney J. Ungar and the Affidavits of Sidney Zasuly all in support of said petition, and the affidavit of Gilbert L. Offenhartz and the statement of Emanuel Thebner in opposition thereto, and after hearing Mr. Sidney J. Ungar, pro se, and Mr. Sidney Zasuly for the application and Mr. Gilbert L. Offenhartz and Mr. Emanuel Thebner opposed, and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that said application be and the same hereby is denied for the reasons stated in the disposition of concomitant Appeals Nos. 4362-64 decided simultaneously herewith, and the petition dismissed, without costs and without disbursements.

Enter:

HYMAN W. GAMSO
Clerk.

ORDER OF THE APPELLATE DIVISION, DATED DECEMBER 21, 1971.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1971.

Present—Hon. Owen McGivern,
Justice Presiding,
Arthur Markewich,
Frances T. Murphy, Jr.,
Aron Steuer,
George Tilzer,
Justices.

4605
[M-8101]

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In the Matter of the Application of Sidney J. Ungar and S. J. Ungar Realty Affiliates, Inc.,

Petitioners,

For an Order Pursuant to Article 78 CPLR,

—directed to—

Hon. James J. Leff, Justice of the Supreme Court, New York County,

Respondent.

---

The above-named petitioners having presented a petition, verified November 17, 1971, to this Court, praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and Rules, directing the respondent to sign an order stating that no settlement had been ef-

*Order of the Appellate Division, dated December 21, 1971.*

fected by Judge Fine of certain underlying actions, directing respondent to disqualify himself from ruling on certain motions below, and for other relief.

And Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent Hon. James J. Leff, Justice of the Supreme Court of the State of New York, having served and filed upon the petitioners on November 29, 1971 an answer to said petition, verified on November 26, 1971,

Now, upon reading and filing the notice of application, dated November 18, 1971, with proof of due service thereof, the petition herein, duly verified on November 17, 1971, and the exhibits annexed thereto, the statement of Sidney Zasuly, statements of Alan S. Liebman, and affidavit of Sidney J. Ungar, all in support of the petition; and the answer of Louis J. Lefkowitz, duly verified on November 26, 1971, and the statements of Joseph Mandell in opposition to the petition; and after hearing Mr. Sidney J. Ungar, appearing pro se, and Mr. Alan S. Liebman for the petition, and Messrs Louis J. Lefkowitz and Joseph Mandell opposed; and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed. Respondent shall recover of petitioners $50 costs and disbursements of this proceeding.

ENTER:

HYMAN W. GAMSO,
Clerk.

ORDER OF THE APPELLATE DIVISION, DATED MARCH 27, 1972.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 27, 1972.

Present—HON. OWEN MCGIVERN, Justice Presiding
ARTHUR MARKEWICH,
THEODORE R. KUPFERMAN,
JAMES B. M. MCNALLY,
ARON STEUER,
Justices.

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5115 N

Action #1
Index No.
7499/1968

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NAHIM ISAIAS,
Plaintiff-Respondent,

*against*

DAVID FISCHOFF, et al.,
Defendants,

*and*

J. J. UNGAR REALTY AFFILIATES, INC.,
Defendant-Appellant.

---

Action #2
Index No.
6979/1969

SIDNEY J. UNGAR,
Plaintiff-Appellant,

*and*

*Order of the Appellate Division, dated March 27, 1972.*

SYLVIA K. MILLER,

Plaintiff,

*against*

DAVID FISCHOFF, et al.,

Defendant,

*and*

NAHIM ISAIAS,

Defendant-Respondent.

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Action #3
Index No.
19924/1970

NAHIM ISAIAS,

Plaintiff-Respondent,

*against*

SIDNEY J. UNGAR,

Defendant-Appellant,

*and*

WATER FRONT SERVICE STATIONS, INC.,

Defendant.

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Action #4

JOSEPH MANDEL,

Plaintiff-Respondent,

*against*

SIDNEY J. UNGAR,

Defendant-Appellant.

---

*Order of the Appellate Division, dated March 27, 1972.*

An appeal having been taken to this Court by the appellant in each of the above-captioned actions from an order of the Supreme Court, New York County (Leff, J.), entered on October 29, 1971, which denied a motion made by appellants for a hearing authorized by the Appellate Division on July 1, 1971, on whether a settlement of the above-entitled actions had been made on April 28, 1971, and which order further denied a request that Justice Leff disqualify himself from hearing and determining the said motion for a hearing on whether the above actions had been settled, because of his prejudice against appellant Sidney J. Ungar and Justice Leff's unsolicited prejudgment and finding, without a hearing, in a memorandum opinion by him dated July 29, 1971 and filed July 30, 1971, that the above four actions had not been settled, and that appellants were not entitled to a hearing, and said appeal having been argued by Mr. Alan S. Liebman of counsel for the appellants, and by Mr. Emanuel Thebner of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed and that the respondents recover of the appellants $30 costs and disbursements of this appeal.

ENTER:

HYMAN W. GAMSO,
Clerk.

## Decision of U. S. District Judge Weinfeld for the Southern Dist. of N. Y.

'2 Civil 21

A simple foreclosure action, instituted in the Supreme Court of the State of New York by Nahim Isaias (here named as a defendant, but not served with process), wherein Sidney J. Ungar, the plaintiff in this suit, and others were enjoined from demolishing three buildings on the properties which are the subject of the foreclosure, spawned a number of other suits, including one for libel and slander, bringing in their wake a multiplicity of motions in the state courts, and finally this federal action by Ungar based upon diversity jurisdiction.

Plaintiff, upon one cause of action, seeks enforcement by this court of an agreement of settlement allegedly entered into by Isaias and other parties of four actions pending in the state court, and in the event performance cannot be effected, damages in the sum of $150,000, and upon a second cause of action he seeks an additional $150,000 damages, allegedly resulting from the nonperformance of the alleged settlement of the state court actions. The defendants deny any settlement was ever entered into, a position thus far upheld by the state courts. Ungar v. Fischoff, 166 N.Y.L.J. at p. 10 (issue of Aug. 3, 1971). See also Isaias v. Fischoff, 37 App. Div. 2d 702, 322 N.Y.S.2d 967 (1st Dep't 1971).

Plaintiff now seeks a preliminary injunction to enjoin Isaias and his attorney from proceeding with the state foreclosure suit and to direct them to withdraw a motion pending there to confirm the referee's report and for the entry of judgment of foreclosure. Although directed against individuals, what is sought in substance is an injunction by a federal court to stay proceedings in a state court, which may be granted, if warranted, only under the exceptions set forth in the anti-injunction statute—that is, "where necessary in aid of [the federal court's] jurisdic-

tion or to protect or effectuate its judgments". 28 U.S.C. § 2283; see Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970). Plaintiff, entirely apart from establishing that the controversy comes within one of the statutory exceptions, must also make an adequate factual showing of irreparable injury to obtain the extraordinary relief he seeks.

No useful purpose would be served to detail the various proceedings and actions in the state court to date. The foreclosure suit here sought to be enjoined has been the subject of numerous motions, appeals, a writ of prohibition and a writ of mandamus. See Ungar v. Leff, 37 App. Div. 2d 934, 326 N.Y.2d 292 (1st Dep't 1971), motion for leave to appeal denied, —— N.Y.S.2d ——, 167 N.Y.L.J. no. 5 at 2 (issue of Jan. 7, 1972). See also Isaias v. Fischoff, 37 App. Div. 2d 702, 322 N.Y.S.2d 967 (1st Dep't 1971). Thus far, plaintiff appears not to have made much headway in his extensive efforts to stay the foreclosure of the properties in which he has a substantial interest. There are presently pending appeals in the Appellate Division, one of which is to be heard at the March Term. The fact that thus far plaintiff has not prevailed in the state court on his various claims and charges, including rejection of his claim of prejudicial bias on the part of the state court justice who ruled adversely to his contention that an agreement of settlement of the action had been entered into does not, by itself, afford a basis to enjoin the state court from proceeding to final judgment in the foreclosure action. Any claim by plaintiff of alleged infringement of his constitutional or other rights can and should be advanced in the state courts; if and when a final judgment is entered, it is subject to appellate review there and ultimately by the Supreme Court of the United States. As the Supreme Court has recently cautioned: "Proceedings in state courts should normally be allowed to continue unimpaired by in-

tervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970); *cf.* Younger v. Harris, 401 U.S. 37, 43 (1971); Samuels v. Mackell, 401 U.S. 66, 69 (1971).

Plaintiff here, as already noted, seeks money damages upon both claims. The injunction now sought is neither necessary in aid of the court's jurisdiction nor to protect or effectuate its judgments; entirely apart from that deficiency, there has been no factual showing of irreparable injury to justify injunctive relief. It is neither warranted by law nor required by the facts. *Cf.* Jacobs v. Tenney, 321 F. Supp. 937 (S.D.N.Y. 1970).

The motion is denied in all respects.

Dated: New York, N. Y., January 25, 1972.

EDWARD WEINFELD,
United States District Judge.

OPINION, JUDGE MACMAHON.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 72 Civ. 21

MEMORANDUM

MACMAHON, *District Judge.*

This is a diversity action in which plaintiff seeks enforcement of an agreement allegedly made in settlement of a number of suits arising from a mortgage foreclosure action in the Supreme Court of the State of New York. Plaintiff's first claim is for specific performance of the settlement agreement or damages in lieu thereof. His second claim is for damages arising from his inability to demolish buildings on the property in question because of a state court injunction, which is still in effect allegedly due to defendants' non-performance of the alleged settlement agreement. Defendant Mandell[1] denies that any settlement was ever agreed upon. Thus far, the New York courts have upheld that contention, and a judgment of foreclosure on the property has been entered.

Plaintiff moves for a preliminary injunction to stay the sale of the property pending the determination of this action. He also moves for leave to amend his complaint against one of the defendants[2] and for an order lifting the state court injunction against the demolition of buildings on the contested property. Defendant Mandell cross-moves for dismissal of the action for failure to state a claim upon which relief may be granted, for lack of subject matter jurisdiction, or because our acceptance of jurisdiction in this action would constitute federal interference with the integrity of the state judicial process.

The dispute stems from a simple foreclosure action which was instituted in the New York courts by defendant Isaias against plaintiff and others and which spawned a number of other actions, including one for defamation brought by defendant Mandell against plaintiff. According to plaintiff, all of these actions were settled by an agreement which he claims was made in April 1971. An order was entered on the alleged settlement, but it was subsequently reversed by the Appellate Division on procedural grounds, the court noting that it was unable to determine whether a settlement had in fact been reached. The court suggested that plaintiff move for a hearing on the existence of a settlement, if he so wished. *Isaias* v. *Fischoff*, 37 App. Div.2d 702 (1st dep't 1971).

On remand, the Supreme Court found, without a hearing, that no settlement had been reached and ordered the foreclosure suit to proceed. Plaintiff made several motions and appeals claiming that he had been deprived of a hearing on the issue of settlement,[3] but the Appellate Division denied them on the ground that plaintiff made an election of remedies in attacking the foreclosure instead of seeking a hearing on the existence of a settlement.

Invoking diversity jurisdiction, plaintiff then brought this action claiming that the state court (a) deprived him of due process by denying a hearing on the existence of a settlement agreement, and (b) impaired the obligation of a valid contract in violation of Article I, Section 10, of the Constitution. Since the institution of this action, the state Supreme Court has entered a final judgment of foreclosure, on which appeal is now pending in the Appellate Division.

We turn, now, to plaintiff's motion for a preliminary injunction staying defendants from selling the property pursuant to the foreclosure judgment.

Although nominally directed against individuals, the requested injunction is actually directed against proceedings in a state court and is, therefore, subject to the anti-in-

junction statute.[4] It is settled that the prohibition of the statute cannot be evaded by addressing the order to the parties or by prohibiting utilization of the results of a completed state proceeding. *Atlantic C. L. R.R.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). Plaintiff, therefore, is not entitled to the extraordinary relief he seeks, unless he shows, first, that his case comes within one of the exceptions to the anti-injunction statute and, second, that he will suffer irreparable harm if injunctive relief is denied.

Plaintiff contends that his case is within the exceptions because an injunction is necessary to effectuate the judgment of the court. However, plaintiff points to a prospective judgment which might have to be protected or effectuated, but the statute refers to an existing final judgment or existing interlocutory decree. *Commerce Oil Refining Corp.* v. *Miner*, 303 F.2d 125 (1st Cir. 1962); *Sperry Rand Corp.* v. *Rothlein*, 288 F.2d 245 (2d Cir. 1961). Plaintiff, thus, fails to bring his case within the exceptions of the anti-injunction statute.

Plaintiff's claim of irreparable injury if an injunction is denied is apparently moot because the Appellate Division has stayed the foreclosure sale pending appeal. Moreover, plaintiff fails to show irreparable injury. His speculative allegations that he will lose his equity on a foreclosure sale and that his damages will be uncertain are plainly insufficient. The motion for a preliminary injunction is, therefore, denied.

We turn to defendant Mandell's motion to dismiss this action in the interest of federal-state comity.

Comity requires that federal courts abstain from interfering with the state judicial process except where that process is not adequate to protect federal rights. *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951).

In the present case, plaintiff fails to show any such inadequacy. His contentions that the state courts have not

considered the issues of the alleged settlement agreement and the alleged violation of his constitutional rights are unfounded, since he admits that both issues have been the focus of a number of motions and appeals in the state courts and will be raised again on the appeal now pending from the final foreclosure judgment.

Plaintiff's lack of success thus far in the state courts is not a sufficient reason for us to intervene by providing an injunction and another avenue for review of the state court's judgment. District courts are not alternative appellate courts for every litigant who loses his case in the state court and comes here crying violation of constitutional rights. Quite the contrary, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic C. L. R. R.* v. *Brotherhood of Locomotive Eng'rs, supra,* 398 U.S. at 296. If a plaintiff is adversely affected by a state court's decision, he can seek vindication of his federal rights in the state appellate courts and, ultimately, if necessary, in the Supreme Court. Anything less is intolerable if federal-state comity is to have any meaning.

Consequently, since there is no overriding federal interest to protect, we find no reason to interfere with the orderly and comprehensive disposition of this action in the state court.

Accordingly, plaintiff's motions are denied in all respects. Defendant Mandell's cross-motion to dismiss is granted, and there being no just reason for delay, the Clerk of the court is directed to enter judgment dismissing this action.

The foregoing constitutes this court's findings of fact and conclusions of law, as required by Rule 52, Fed.R. Civ.P.

So ordered.

Dated: New York, N. Y., April 20, 1972.

LLOYD F. MCMAHON
United States District Judge

FOOTNOTES

[1] Nahim Isaias, who is also named as a defendant, was served after the action was commenced and after the present motion was argued. He has since made a motion, which is now pending, to quash service upon him.

[2] Defendant Isaias was served with the amended complaint, and thus plaintiff seeks to amend the original complaint only as to defendant Mandell.

[3] Plaintiff also sought a writ of prohibition alleging prejudicial bias by the State Court Justice who ruled that no settlement agreement existed. It was denied by the Appellate Division.

[4] The anti-injunction statute prohibits a federal court from enjoining proceedings in a state court unless Congress has authorized it by statute or unless it is necesary to aid the federal court' jurisdiction or to protect or effectuate its judgments, 28 U.S.C. § 2283.

SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR and S. J. UNGAR REALTY AFFILIATES, INC.,
*Petitioners,*

*against*

HON. JAMES J. LEFF, Justice of the Supreme Court, New York County,
*Respondent.*

---

SIDNEY J. UNGAR,
*Petitioner,*

*against*

NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,
*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION FIRST DEPARTMENT OF THE SUPREME COURT OF NEW YORK

## BRIEF IN OPPOSITION

LOUIS J. LEFKOWITZ
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State of New York
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IN THE

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*Petitioner,*

*against*

NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION FIRST DEPARTMENT OF THE SUPREME COURT OF NEW YORK

## BRIEF IN OPPOSITION

### Statement

This brief will concern itself only with the petition for certiorari in the case of *Ungar* v. *Leff*.

Petitioners seek certiorari to review a determination by the Appellate Division, First Department denying prohibition against respondent, Hon. James J. Leff, Justice of the Supreme Court of New York, against conducting any proceedings in any of four actions related to a certain foreclosure action entitled *Isaias* v. *Ungar*. The petition alleged that Judge Leff was biased against the petitioners. The proceeding below also sought to vacate Judge Leff's order that a reference already begun before the Hon. Frank J. McNabb, Official Referee, and originally ordered by Mr. Justice Fine on March 19, 1971 to hear and report on the issue of the amount due to Nahim Isaias on a defaulted mortgage he holds from Ungar, go forward and be continued.

In a motion made simultaneously with such proceeding for prohibition, petitioners requested that the Appellate Division amend and clarify its remittitur dated July 1, 1971 in a case where it unanimously reversed a finding by *Fine*, J., made subsequent to his order of reference that a stipulation of settlement had been entered into by petitioners and the underlying plaintiff. Appellants requested in that motion to amend the remittitur, that the Appellate Division direct that a hearing be held and testimony be taken to determine whether or not a stipulation and settlement was made by the parties in open court finally disposing of the underlying actions. The Appellate Division unanimously denied the motion the same day it denied prohibition.

## The Only Issue Presented

Does petitioner have an adequate state remedy with which to protect himself so as to interdict interference with pending state proceedings?

## Respondent's Contentions Below

It was argued in the Appellate Division that not only was there no merit to the petitioners' contentions that Judge Leff had prejudged the case but that in any event petitioners had a proper and adequate remedy by way of taking an appeal from whatever final judgment Judge Leff might make.

Indeed, such an appeal has now been filed in the Appellate Division of the Supreme Court of New York. Both sides have perfected and it is scheduled to be argued on May 11, 1972. In the meantime, however, demolition of the buildings in question have been enjoined. The petitioner in the meantime has had the use of approximately $220,000 at the cost of (at worst—if he loses) 7%, the interest allowed by the Courts of New York in lawsuits. The interest rate in the market place for a corporation in the real estate business is substantially higher, as found by Judge Leff.

## Underlying Facts of the Case

The Ungar interests (Sidney J. Ungar, S.J. Ungar Affiliates, Waterfront Stations, Inc., Sylvia K. Miller) are the owners by purchase, of the fee of certain parcels of real property. Various of the Ungar interests also purchased the first mortgages and are the owners thereof. A junior mortgage is owed by Isaias. It is undenied that said junior mortgage is in default. Isaias brought an action to foreclose same. After much litigation and after the Appellate Division reversal Judge Fine's order that there had been a stipulation of settlement, the case was transferred to an IC part and each of the subsequent motions came on to be heard before Judge Leff, the respondent.

Judge Leff, as a prerequisite to deciding the motions held that the record indicated that as a matter of state law, there was not a binding settlement made between the parties. Thus finding, he rejected the various applications of the Unger interests and directed that the reference previously begun go forward to take testimony on the issues of the exact amount of money actually owed Isaias on the defaulted mortgage.

Petitioners herein subsequently directly appealed each of those findings as well as the order of Judge Leff which directed that reference continue. The order appealed from was affirmed. Among other things it was not from a final judgment. Petitioners are presently in the process of appealing in the Appellate Division from Judge Leff's final judgment based on the report of reference. It is scheduled to be argued on May 11.

## Reasons for Denying Certiorari

There is no indication whatever that petitioners cannot receive a fair review in the New York State appellate courts now that there is a final judgment. Indeed, such a complete review from the entire final judgment is scheduled to be heard on May 11. Moreover the availability of an appeal from final judgment is the settled basis for denying prohibition (N. Y. Civil Practice Law and Rules, Section 7801, subd. 1. *Lawrence* v. *Supreme Court*, 24 AD 2d 849, 264 N.Y.S. 2d 501 (1965). See: *Duncan* v. *Tennessee*, —— U.S. ——, 40 L.W. 4206, Feb. 23, 1972. Further too, petitioners' plenary suit, on an amended complaint in the Federal courts, seeking to enforce the alleged settlement on information and belief, is *sub judice*.

On the merits, it is well to note that Judge Leff apparently made a correct decision according to state law in his ruling that there was not a settlement. That this must be so is indicated by the fact that the Appellate Division re-

fused to amend its remittitur. The later denial of petitioners' appeal to it from respondent's directions and findings also indicated that Judge Leff was correct as a matter of state law, although the Appellate Division could have denied merely because it was untimely. (See order of Appellate Division dated March 29, 1972—Isaias Appendix p. 17.)

In any event, with respect to petitioners' motion for prohibition; that was a remedy which petitioners were not only not entitled to have as a substitute for appeal but one which they did not deserve on the merits.

There is no doubt that after reading the motion papers in the proceedings below, and after reading the entire record, Judge Leff formed an unfavorable opinion of one of the litigants, the appellant Ungar. But this is not a bias which prevented a fair decision. See *Unger* v. *Sarafite*, 376 U.S. 575; N. Y. Judiciary Law, Section 15; *Matter of Rotwein (Goodman)*, 291 N.Y. 116, 123 (1943).

Moreover, it must be noted that the very fact that Judge Leff ordered the reference by Hon. Frank J. McNabb to proceed as originally ordered by Justice Fine, to hear and report as to exact amount of money owed by petitioner to Isaias in an *undeniably* defaulted mortgage belies the claim of appellant of any pervading bias. Judge Leff did not withdraw the case from the referee for trial by himself but instead ordered the matter continued before the same referee appointed by a judge whose disinterestedness petitioner has never questioned. Indeed, the recommendations made by this referee have been followed by respondent, Judge Leff.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Dated: New York, New York, May 3, 1972.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR AND
S. J. UNGAR REALTY AFFILIATES, INC.,
*Petitioner,*

v.

HON. JAMES J. LEFF,
Justice of the Supreme Court,
New York County,
*Respondent.*

SIDNEY J. UNGAR,
*Petitioner,*

v.

NAHIM ISAIAS AND
WATER FRONT SERVICE STATIONS, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

The opposition on behalf of Judge Leff in the prohibition action argues principally that certiorari should be denied because of the availability of an appeal in the proceedings to which the prohibition

action relates. It argues further that petitioner's plenary suit to enforce the settlement agreement is under consideration in the Federal courts, that Judge Leff apparently made a correct decision in ruling that there was not a settlement, that Judge Leff undoubtedly formed an unfavorable opinion of petitioner "after reading the motion papers in the proceedings below, and after reading the entire record," but that "this is not a bias which prevented a fair decision," and that the claim of any pervading bias is belied by the fact that Judge Leff ordered the reference in the foreclosure action to proceed before the same Referee previously designated by Judge Fine and followed the recommendations of the Referee.

As noted in the petition, petitioner's application for an order of prohibition asserted a denial of due process under the United States Constitution deriving from Judge Leff's manifest bias and prejudice, his determination of a controlling issue without a hearing, and his continuation of an injunction damaging to petitioner which, according to the Judge's own findings, served no purpose other than to punish petitioner. The Appellate Division ordered the application denied and the petition dismissed without rendering an opinion explaining its reasons. The decisions of the New York Court of Appeals make clear that the availability of an appeal does not preclude an order of prohibition and that an order of prohibition will be granted where it provides a more effective remedy to protect constitutional rights. *Martinis v. Supreme Court*, 15 N.Y. 2d 240, 206 N.E.2d, 165 (1965); *Hogan v. Court of General Sessions*, 296 N.Y. 1, 68 N.E.2d 849 (1946); *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 199 N.E. 628 (1936); *Culver Contracting Corporation v. Humphrey*, 268 N.Y. 26, 196 N.E. 627 (1935).

As to the remaining reasons set forth in the opposition, petitioner's plenary suit in the United States District Court to enforce the settlement agreement has been dismissed in the interest of federal-state comity with the statement that petitioner "can seek vindication of his federal rights in the state appellate courts and, ultimately, if necessary, in the Supreme Court." (See Appendix to Brief of Respondent Isaias, p. 24). The suggestion that Judge Leff's decision was "apparently" correct, which is most vigorously disputed, does not justify the denial of a fair trial and the deprivation of due process resulting from manifest bias, the determination of a controlling issue without a hearing, and a decision based on vindictiveness contrary to the Judge's findings. The arguments that there was no bias on the theory that Judge Leff merely formed an unfavorable opinion of petitioner after reading the motion papers in the proceedings below and that he followed the recommendations of the Referee designated by Judge Fine are similarly baseless. A simple reading of the extreme epithets uttered by Judge Leff with respect to petitioner, both orally and in his opinion, demonstrate that the basis for them cannot be found in the pleadings in the case. The statement that Judge Leff followed the recommendations of the Referee is obviously in error since he increased the award of interest by $119,000 and the attorney's fee allowed by $24,800.[1]

The appropriateness of the remedy of prohibition is highlighted by the effect of Judge Leff's continuation of the injunction as an act of retributive vengeance notwithstanding his finding that "it appears unquestioned" that "the injunction against demolition could

[1] Respondent's statement that petitioner had the use of money at the rate of 7% per annum was also in error since the Court's judgment fixed interest rate at 15-3/4%. Moreover, it appears from the proceedings below that funds were available to petitioner from the Chase Manhattan Bank at 6% or less.

be vacated without prejudice to the payment of Isaias' claim." The petition sets forth the loss of revenue of from $3,500 to $5,000 per month as a result of the injunction. Unless petitioner can obtain forthwith a fair hearing before an unbiased Judge on both the necessity for continuation of the injunction and on the question whether there had been a settlement agreement with respect to all the related litigation,[2] these losses will continue through protracted appeals in the Appellate Division and the Court of Appeals, and possibly further hearings on remand in connection with the amount owing in the foreclosure action which is now on appeal in the Appellate Division as both respondents point out.[3] Furthermore, one of the "related actions" is a suit for defamation brought by respondent Isaias' attorney against petitioner which has not yet come to trial.

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[2]After Judge Leff had decided without a hearing that the parties had not entered into a settlement agreement before Judge Fine, petitioner field a motion in all the related actions, including the separate injunction action, for a hearing on whether a settlement of these actions had been made on April 28, 1971, and requesting that Judge Leff disqualify himself from hearing and determining the motion. This motion also raised the due process questions under the United States Constitution which are raised in this petition. On March 27, 1972, the Appellate Division affirmed an order of Judge Leff denying this motion. (See Appendix to Brief of Respondent Isaias, p. 17.) On April 20, 1972, the Appellate Division denied leave to appeal.

[3]The petition in the present case does not seek review of any of the rulings in the foreclosure action but only the final judgments in the action for an order of prohibition and the separate action brought by Respondent Isaias in which an injunction against demolition was granted. If petitioner is successful in having reversed the final judgments in these actions, he will be protected against the continuing and substantial losses resulting from the injunction and the right to a fair hearing before an impartial tribunal in the continuing proceedings will be safeguarded.

Respondent Isaias' brief opposes certiorari in both the prohibition and injunction actions on grounds which, for the most part, are entirely baseless if not frivolous.[4] The opposition argues that the petition with respect to prohibition was untimely, that there is no jurisdiction because it does not raise a federal question respecting the validity of a State statute, that the records of proceedings in the courts below were not filed in this Court, that the order of the Appellate Division of January 25, 1972, is not a final judgment, that an appeal in the injunction action was abandoned, and that the Appellate Division held that petitioner had waived his claim of a settlement agreement.

The claim that the petition with respect to prohibition is untimely obviously overlooks the settled rule that the time for filing a petition is computed from the date of the order denying leave to appeal and not from the date of the original order. *American Railway Exp. Co.* v. *Levee*, 263 U.S. 19, 21. The contention that the petition should be dismissed because the records in the proceedings below were not filed in this Court obviously overlooks Rule 21 of the current Rules of this Court which states that "the filing of the record in this Court is not a requisite for docketing the petition."

Respondent's objection that this Court has jurisdiction to decide only a federal question respecting the validity of a State statute disregards the language of 28 U.S.C. 1257(3) that this Court may review by writ of certiorari final judgments or decrees of State Courts "where any * * * right * * * is specially set up or claimed under the Constitution * * * of the United

[4] Although it is stated that respondent Isaias intervened and filed opposing papers in the prohibition proceeding, the order of the Appellate Division of September 21, 1971, indicates that it acted solely upon the pleadings and argument of petitioner and the Attorney General. (Appendix to Petition, pp. 3a-4a.)

States". In both the prohibition proceeding and the injunction action, as the petition demonstrates, petitioner specially set up the claim that the due process clause of the Fourteenth Amendment of the United States Constitution entitled him to a fair trial before an impartial Judge, as well as a hearing before the adjudication of any question affecting important substantive rights, and that the actions of the courts below deprived him of this constitutional right.

Respondent's objection that the Appellate Division's order of January 25, 1972, is not a final judgment is based upon the misconception that petitioner seeks review of all asepcts of that order. The petition makes clear that it relates only to the dismissal of the appeal with respect to denying vacation of the judgment of injunction. Respondent's opposition recognizes that the injunction action is a separate action and that a final judgment has been rendered in that proceeding. It argues that petitioner abandoned his appeal from the grant of the injunction and that that action has become final. Petitioner did abandon his appeal from the original grant of a permanent injunction in the suit instituted by respondent Isaias. Thereafter, on the basis of new circumstances, petitioner moved for vacation of the injunction in accordance with well established principles of equity. This motion was denied. The dismissal of the appeal with respect to the denial of this motion which left the permanent injunction to continue in effect is the final judgment to which the petition relates.

Respondent's claim that the Appellate Division has ruled that petitioner has abandoned his claim based on the settlement agreement, and consequently the right to a hearing thereon, is entirely without foundation. The opinion quoted by respondent related to a motion in the foreclosure action and can be construed to mean no

more than that, in the state of the proceedings then before the court, there was "no basis for impeding the progress of the foreclosure action." Petitioner has promptly and vigorously pursued his right to a hearing on the settlement issue. The absence of any abandonment of the settlement agreement is evidenced by petitioner's immediate informal efforts to have a hearing on the settlement issue which are described in the petition, his attempt to have the Appellate Division's judgment clarified with respect to the procedure for a hearing, his formal motion in the four related actions for a hearing, and the plenary action instituted in the United States District Court based upon the settlement agreement.

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